IN THE HIGH COURT OF TANZANIA

(MOROGORO SUB - REGISTRY)

AT MOROGORO

LAND APPEAL NO. 28 OF 2022

(Originating From Land Application No. 01 of 2020 in the District Land and Housing Tribunal for Kilombero/Malinyi, at Ifakara)

SALVINA KANOKO..... 1st APPELLANT

KHADIJA OMARY ..... 2nd APPELLANT

VERSUS

JOSEPH MDUMA ..... RESPONDENT

JUDGMENT

20th June & 28th July, 2023

CHABA, J.

This appeal traces its origin from the District Land and Housing Tribunal for Kilombero/Malinyi, at Ifakara (the DLHT) vide Land Application No. 1 of 2020, where the appellants herein jointly sued the respondent for trespass over 16 acres of land located at Idete in Miwangani village within Kilombero District in which ten (10) acres of land were alleged to belong to the 1st appellant and the remaining six (6) acres were claimed to belong to the 2nd appellant.

After a full trial, on 10th February, 2022, the DLHT adjudicated the matter in favour of the respondent after being satisfied that the respondent was lawfully allocated the land in dispute by the Idete village. Aggrieved by that

decision of the DLHT, the appellants lodged the instant appeal basing on the following grounds: -

i. That, the trial Tribunal erred in law and facts by pronouncing the judgment in favour of the Respondent against the six (6) acres of the 2nd Appellant only and left the remaining ten (10) acres of the 1st Appellant undetermined.
ii. That, the trial Tribunal erred in law and facts for failure to visit locus in quo while the parties' testimonies proved the need to do so, as a result it failed to determine the dispute on merit.
iii. That, the trial Tribunal erred in law and facts for pronouncing victory to the Respondent by relying on untrustworthy testimony of the Respondent.
iv. That, the trial Tribunal erred in law and fact for failure to compose judgment as per mandatory requirements of the law.
v. That, the trial Tribunal erred in law and facts for failure to receive and admit the Appellant's exhibits.
vi. That, the trial Tribunal erred in law and facts for failure to assess, analyse and evaluate parties' evidence in turn it reached into erroneous decision.

On 20th June, 2023, when the appeal was called on for hearing, the appellants had the services of Mr. Samwel Banzi, the learned counsel, whereas the respondent was under the representation of Mr. Bageni Elijah, also learned counsel. With the parties' consensus, the matter was disposed of by way of written submissions. Both parties complied with the Court's scheduled orders.

Arguing in support of the appeal, Mr. Banzi, the learned advocate for the appellants commenced his submissions by adopting the grounds of appeal and prayed the same to form part and parcel of the appellants' submission. In arguing the appeal, Mr. Banzi chose to argue all grounds separately save for the third and fifth grounds which were consolidated.

Submitting on the first ground, Mr. Banzi contended that, the appellants brought the application against the respondent before the DLHT for trespassing over 16 acres of land, whereas the first appellant's claim was on ten (10) acres and the second appellant's claim was on six (6) acres, but the trial chairperson only directed his mind on giving judgment on six (6) acres only, in favour of the respondent leaving other ten (10) acres undetermined.

As for the second ground, the counsel for the appellants' averment was that, the trial DLHT went astray on pronouncing the judgment without stating whether the visit of locus in quo was done and regard to the necessity of doing so. Placing reliance on the decision of this Court in the of **Robert Rwabutara vs. Jesca Juma (Misc. Land Appeal No. 14 of 2021) [2022] TZHC 338 (25 February 2022),** Mr. Banzi contended that, it was indeed very necessary for the DLHT to visit the locus in quo and satisfy itself before arriving to the final judgment.

Concerning the third and fifth grounds of appeal, Mr. Banzi lamented that the DLHT erred in law and in fact by deciding the matter in favour of the

respondent whose evidence was fabricated and forged. He averred further that, since the respondent did not bring to the tribunal the persons who dispatched such documents to him and identify it to the effect that, the same are the ones that were dispatched to him (respondent), and that its genuineness were the same, such piece of evidence should not be believed and relied upon. He submitted that, the appellants were denied a chance to tender their exhibits to establish and prove ownership of the land in disputes taking into account that they owned the same since 1996. More-over, Mr. Banzi asserted that, the proceedings at the DLHT were engulfed with lots of procedural irregularities.

As regards to the fourth ground, Mr. Banzi referred this Court to the case of **Abubakary I.H. Kilongo and Another vs. The Republic,** Criminal Appeal No. 230 of 2021 (unreported) which quoted the case of **Amirali Ismail vs. Regina, 1. T.L.R 370** regarding the contents of a good judgment and accentuated that, the judgment of the DLHT is not clear and it is ambiguous, hence should be reversed to that effect.

In respect of the sixth ground of appeal, the appellants' complaint is that, the DLHT neither well analysed the evidence on record, nor evaluated and assessed the same, hence the chairperson did arrive at a confusing, erroneous and ambiguous judgment.

In the end, the counsel for the appellants rested his submission by praying the Court to allow the appeal with costs, quash the judgment and orders

emanated from trial tribunal, and declare that the appellants are rightful owners of the disputed land.

In reply, Mr. Bageni Elijah, the learned counsel for the respondent highlighted that, the complaint raised by the appellants on the first ground of appeal is sound. He stated that, truly the paragraph in the judgment of the DLHT is coached in a way that draws a conclusion that the judgment was so concerned with the six (6) acres only, which the 2nd appellant claimed ownership leaving the other ten (10) acres claimed by the 1st appellant undetermined. He however submitted that, the anomaly appears to be innocuous (not harmful) for a reason that the evidence on record and the finding of the trial tribunal, was made after a thorough analysis and evaluation of evidence adduced by both parties which in effect gave a conclusion that, the appellants failed to prove their case unlike the respondent who managed to prove his ownership of twenty (20) acres, in which the disputed suit land was part of the whole 20 acres.

As to the second ground, it was Mr. Bageni's contention that the complaint that, the trial tribunal didn't visit the locus in quo this was purely an afterthought as there is nothing in the record suggesting that it was necessary to visit to a locus in quo by the trial tribunal due some exceptions.

On the third and fifth ground of appeal, Mr. Bageni submitted that, since the respondent's evidence was heavier than that of the appellants, it was

accorded with the weight it deserves as credible and trustworthy. He added that, the appellants who were legally bound to prove their case, did nothing and that they didn't tender any document other than their weak and vague testimonies.

Submitting on the fourth ground, the counsel for the respondent briefly highlighted that, the impugned judgment is in conformity with all requirements of the law contrary to the appellants' allegations that the same fall short of qualities of a judgment.

As for the sixth ground, Mr. Bageni insisted that on balance of probabilities the respondent's evidence was heavier than that of the appellants and the tribunal rightly decided in favour of the respondent. In conclusion, the learned counsel wound up his submission by praying the appeal be dismissed with costs for want of merit.

I have given due consideration and weight to the rival submissions advanced by the learned advocates for both sides. I have also cautiously gone through the entire proceedings of the trial tribunal as well as the impugned judgment. The crucial issue for consideration and determination is whether this appeal has merits.

I will commence with the 1st ground of appeal which states that, the trial DLHT erred in law and facts by pronouncing the judgment in favour of the respondent against the six (6) acres of the 2nd appellant only, and left the

remaining ten (10) acres of the 1st appellant un-determined. As gleaned from the records of the trial tribunal, the main claim of the appellants relates to the issue of ownership of the parcel of land measuring sixteen (16) acres located at Idete area, in Miwangani village within Kilombero District. Further, it is apparent that, in determining the first framed issue concerning ownership of the parcel of land in dispute, the learned Chairperson only determined on the six (6) acres claimed to be owned by the 2nd appellant, leaving neither reasoning nor determination concerning the remaining 10 acres which was also amongst the appellants' claims as per application filed on 6th January, 2019 at the DLHT for Kilombero.

Having revisited the Judgement of the trial DLHT, and for the sake of clarity, I wish to reproduce some paragraphs including the 2nd and 3rd paragraphs on page 9 and the 3rd paragraph on page 10 both of the typed trial tribunal's judgment, read as follows, I quote: -

> "*.....**mjibu maombi katika shauri hili Joseph Karia Mrindoko anatuhumiwa kuvamia hekari 6 za Ardhi mali ya Khadija Omary aliyouziwa na ndugu Mlela ambaye naye alipewa ardhi hiyo na Salvina Kanoko.***
>
> *Hivyo Jukumu la msingi la walalamikaji wawili lilikuwa ni kuthibitisha uvamizi wa eneo gombewa uliofanywa na mlalamikiwa Joseph Karia Mrindoko. Katika utetezi wake Joseph Mrindoko ambaye alitoa Ushahidi wake kama SU1*

aliweza kuleta vielelezo ikiwa ni pamoja na barua toka Serikali ya Kijiji cha Idete ya tarehe 16/10/1997, barua hiyo ilipokelewa kama kielelezo D1 na kwa mujibu wa kielelezo hicho, SU1 alipewa eneo la ekari 20 kwa matumizi ya kilimo na kwa mujibu wa kielelezo D2 ambayo ni stakabadhi ya Kijiji, SU1 alifanya uhakiki wa shamba lake mnamo tarehe 17/01/2017.

Baada ya kupitia kwa umakini Ushahidi wa pande zote mbili, imekuwa bayana kwamba ***wadai wameshindwa kuthibitisha uvamizi wa eneo la hekari 6 mali ya mleta maombi wa pili****. Mjibu maombi ameweza kupitia Ushahidi wake kuonesha ya kwamba shamba la hekari 20 analolimiliki kutoka mwaka 1997 mpaka leo amelipata kihalali na hivyo ana haki ya kuendelea kulimiliki". (Emphasis added).*

From the foregoing excerpt of the judgment of the DLHT, there is no gainsaying that, the learned Chairman determined the issue of ownership partially and contrary to what was pleaded for, which in my considered view, was wrong and against a cherished principle that Courts are obliged to determine matters presented before it (them) and in accordance with the pleadings, issues framed and evidence adduced by the parties as it was underscored and emphasized by the Court of Appeal of Tanzania in the case of **National Insurance Company**

vs. Sekulu Construction, Civil Appeal No. 31 of 1984 reported in (1984) TLR 157, where the Court held: -

> *"The whole trial is null and void because of the fundamental divergence between the improper form of pleading and the evidence adduced at the trial, and that between what was tried and what was finally decreed, and between the sum decreed as due and the sum allowed in execution proceedings".*

The above legal position was insisted in the case of **Chantal Tito Mziray & Another vs. Ritha John Makala & Another (Civil Appeal No. 59 of 2018) [2020] TZCA 1930 (31 December 2020),** extracted from tanzlii.go.tz, wherein the Court observed that: -

> *"We must emphasize that issues framed by the court and agreed by the parties in a trial of a civil suit are intended to draw the attention of the judge or magistrate and the parties to the precise matters which are in dispute, instead of allowing the case to be left wondering in a vague state.* ***Issues, therefore, bind the parties and the court respectively to adduce evidence and make the decision in an orderly manner guided by the pleadings, the adduced evidence and the law".*** *(Emphasis added).*

In the matter under consideration, and as rightly accentuated by the counsel for the appellants, the learned Chairperson was, with due respect, wrong for failure to determine the fate of the whole sixteen (16) acres which were in dispute and instead therefore, adjudicated only on the six (6) acres in line with general determination of twenty (20) acres of the disputed parcel of land which were not pleaded for and hence leaving the issue of controversy between the parties unresolved to its fullest and clarity. I say so simply because, as divulged from the pleadings of the DLHT, the disputed parcel of land is measured sixteen (16) acres and not twenty (20) acres. In my opinion, I find this facet to be a material irregularity in the impugned judgment, this is because, if the judgment will be left to stand with the ambiguities it has, it follows therefore that, the orders stemming thereof will be uncertain and inexecutable, hence resulting into endless litigations.

From the above finding, the next question is, what is the effect / consequences of the above noted material irregularities in as much as this Land Appeal No. 28 of 2022 is concerned? In my view, the answer is not far-fetched. At this juncture, I wish to state a settled stance that when a crucial issue which is relevant in resolving the parties' dispute is left unresolved, an appellate Court cannot step into the shoes of the lower Court and assume such a duty. Guided by the principle underscored by the CAT in the case of **Truck Freight (T) Ltd vs. CRDB Ltd,** Civil Application No. 157 of 2007 (unreported), wherein the Court observed that: -

"When an issue which is relevant in resolving the parties, dispute is not decided, an appellate Court cannot step into the shoes of the lower Court and assume that duty but it has to remit the case to that Court for it to consider and determine the matter". ..... We therefore, allow the appeal and quash the decision....".

I find it apt to remit the case file to the trial tribunal for it to consider and determine the matter unresolved. See also] the cases of **Tina Co. Ltd Others vs. Eurafrican Bank T Ltd (Commercial Review No. 7 of 2018) 2019 TZCA 120 (25 February 2019); Joseph Ndyamukama vs. NIC Bank Tanzania Ltd Others (Civil Appeal 239 of 2017) 2020 TZCA 1889 (11 December 2020); Mantra Tanzania Ltd vs. Joaquim Bonaventure (Civil Appeal 145 of 2018) [2020] TZCA 356 (17 July 2020);** Extracted from tanzlii.go.tz., and **Alnoor Shariff Jamal vs. Bahadur Ebrahim Shamji,** Civil Appeal No. 25 of 2006 (unreported)**.**

Having found that the matter under consideration falls in the same respect of the above cited precedents, I shall neither step into the shoes of the trial DLHT and properly determine the issue, nor proceed with the testing of other grounds of appeal as by so doing, that will be a wastage of precious time of this Court.

In the final event, I allow the appeal with no order as to costs, and proceed to quash and nullify the trial tribunal's judgement, decree and any other orders stemmed therein. I further order and direct that, trial tribunal's records be remitted to the District Land and Housing Tribunal for Kilombero/ Malinyi, at Ifakara for it to render a decision after considering what it was pleaded for by the appellants / applicants, issues framed as well as the evidence adduced during trial of Land Application No. 1 of 2020. **It is so ordered.**

DATED at **MOROGORO** this 28th day of July, 2023.

M. J. CHABA

JUDGE

28/07/2023

Court:

Judgment delivered under my Hand and Seal of the Court in Chambers this 28th day of July, 2023 in the presence of Mr. Bageni Elija, the Learned Advocate who entered appearance for the Respondent also holding brief for Mr. Samwel Banzi, the Learned Advocate for the Appellants.

M. J. CHABA

JUDGE

28/07/2023

Court:

Rights of Appeal to the parties fully explained.

M. J. CHABA

JUDGE

28/07/2023